

150 FERC ¶ 61,099  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Chairman;  
Philip D. Moeller, Tony Clark,  
Norman C. Bay, and Colette D. Honorable.

Eastern Hydroelectric Corporation

Project Nos. 7019-069  
7019-070

ORDER DENYING REHEARING, DISMISSING MOTION FOR STAY,  
AND REJECTING NOTICE OF WITHDRAWAL OF PLEADING

(Issued February 19, 2015)

1. On October 16, 2014, the Commission revoked Eastern Hydroelectric Corporation's (Eastern Hydro) license for the East Juliette Hydroelectric Project No. 7019 pursuant to section 31(b) of the Federal Power Act (FPA) (Order Revoking License) for failure to comply with the terms of the license.<sup>1</sup> On November 17, 2014, Eastern Hydro filed a request for rehearing and stay of the Order Revoking License.<sup>2</sup> We deny rehearing and stay.

2. In addition, on November 14, 2014, Eastern Hydro filed a notice of withdrawal of its May 1, 2000 application to amend its license to increase total installed capacity of the East Juliette Project by 1,200 kilowatts (kW) (2000 Amendment Application). We reject Eastern Hydro's notice of withdrawal.

**I. Background**

3. On February 28, 1985, Commission staff issued a minor license to the City of Forsyth, Georgia, for the East Juliette Project, located on the Ocmulgee River in

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<sup>1</sup> *Eastern Hydroelectric Corporation*, 149 FERC ¶ 61,036 (2014).

<sup>2</sup> Eastern Hydro's November 14, 2014 filing also seeks clarification of the Order Revoking License. However Eastern Hydro's requests for clarification are essentially requests for rehearing of the Order Revoking License. As such, we will address rehearing and stay, clarification is not necessary.

East Juliette, Jones County, Georgia.<sup>3</sup> Eastern Hydro acquired the license in 1995.<sup>4</sup> The project includes: (1) a 20-foot-high, 1,230-foot-long concrete gravity dam that creates a 78-acre reservoir with a storage capacity of 418 acre-feet; (2) two powerhouses on the east bank of the river, one at the dam (north powerhouse) and the other 800 feet downstream of the dam (south powerhouse). Water flows to the north powerhouse, containing a 458-kW generating unit, and is discharged through a 23-foot-wide, 430-foot-long tailrace to the river. Water is then diverted through a 13-foot-wide, 400-foot-long intake canal and a 7-foot-wide, 220-foot-long penstock to the south powerhouse, containing a 229-kW generating unit.<sup>5</sup> The south powerhouse has not operated since 1999.

4. The East Juliette Dam was built in 1921, and it is the first passage barrier that anadromous fish, including American shad, encounter on their migrations upstream from the Atlantic Ocean to the Ocmulgee River. The Georgia Department of Natural Resources (Georgia DNR), the National Marine Fisheries Service (NMFS), and the U.S. Fish and Wildlife Service (FWS) (collectively resource agencies) state that restoring access to historical spawning habitat for American shad is among their highest priorities for the region.<sup>6</sup>

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<sup>3</sup> *City of Forsyth, Georgia*, 34 FERC ¶ 62,438 (1986) (Order Issuing License (Minor)).

<sup>4</sup> On May 2, 1994, Commission staff approved the transfer of the license from the City of Forsyth, Georgia, to PK Ventures, Inc. *City of Forsyth, Georgia and PK Ventures, Inc.*, 67 FERC ¶ 62,090 (1994). Shortly after PK Ventures acquired the license, it merged with Tampa Pipeline Company (Tampa), but failed to notify the Commission until Eastern Hydro sought to acquire the license. Consequently, in May 1995 Commission staff approved the transfer of the license from PK Ventures, Inc. to Tampa and from Tampa to Eastern Hydro. *Eastern Hydroelectric Corporation, Tampa Pipeline Corporation and PK Ventures, Inc.*, 71 FERC ¶ 62,129 (1995). Mr. Robert Rose is the president or principal of all three companies.

<sup>5</sup> *Eastern Hydroelectric Corporation*, 76 FERC ¶ 62,170 (1996) (amending license to increase project's installed capacity from 643 to 687 kW).

<sup>6</sup> See NMFS letters filed August 13, 2014, August 3, 2010, October 29, 2007, October 13, 2000, and September 6, 2000; FWS letters filed August 13, 2014, August 3, 2010, November 13, 2007, October 20, 2000, and September 7, 2000; and Georgia DNR letters filed August 13, 2014, September 20, 2010, November 15, 2007, and September 26, 2000.

5. On May 1, 2000, Eastern Hydro filed a request to amend its license to authorize the construction of an additional powerhouse containing a 1,200-kW generating unit on the west side of the river. In June 2002, Commission staff granted the amendment (2002 Amendment Order).<sup>7</sup> The 2002 Amendment Order added Article 401 to the license to require that Eastern Hydro install fish passage facilities at the Eastern Juliette Dam, concluding that “[c]onstruction of a fishway in combination with a fish passage management plan would lead to long-term benefits to the aquatic resources and natural resource values of the Ocmulgee River” and “would” allow American shad to access approximately 18 miles of spawning habitat above the project dam.”<sup>8</sup> Specifically, the article requires Eastern Hydro to develop a plan in consultation with Georgia DNR, NMFS, and FWS that includes: (1) proposed fish passage facilities and their operation; (2) a construction schedule; and (3) annual consultation with the agencies to address fish passage and entrainment issues at the project. The 2002 Amendment Order also included four conditions contained in a water quality certification issued by Georgia DNR for the amendment.<sup>9</sup> Certification condition 4 requires Eastern Hydro to install fish passage facilities at the project.<sup>10</sup> Eastern Hydro did not seek rehearing of the 2002 Amendment Order.

6. After receiving several extensions of time, on January 5, 2006 (as supplemented on April 25, 2006), Eastern Hydro filed a plan to construct a fish lift on the east side of the river that incorporated most of the agencies’ recommendations.<sup>11</sup> Eastern Hydro

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<sup>7</sup> *Eastern Hydroelectric Corporation*, 99 FERC ¶ 62,207 (2002).

<sup>8</sup> *Id.* at 64,490.

<sup>9</sup> Under section 401(a)(1) of the Clean Water Act (CWA), the Commission may not authorize the construction or operation of a hydroelectric project unless the state water quality certifying agency either has issued water quality certification for the project or has waived certification by failing to act on a request for certification within a reasonable period of time, not to exceed one year. 33 U.S.C. § 1341(a)(1) (2012). Section 401(d) of the CWA provides that the certification shall become a condition of any federal license that authorizes construction or operation of the project. *Id.* § 1341(d). Appendix A to the June 2002 Order contains the certification conditions. 99 FERC ¶ 62,207, at 64,492 (2002).

<sup>10</sup> Eastern Hydro never built the third powerhouse.

<sup>11</sup> The proposed fish lift would have operated by directing fish into a hopper at the toe of the dam. The hopper would rise vertically via an elevator system and release the fish into the reservoir at the top of the dam.

stated that the fish lift would be constructed and operational by March 1, 2007. In August 2006, Commission staff issued an order modifying and approving Eastern Hydro's plan (2006 Order).<sup>12</sup>

7. Eastern Hydro did not construct the approved fish lift, and in April 2007 Commission staff issued a Compliance Order (2007 Compliance Order) directing Eastern Hydro to comply with the requirements of the 2006 Order.<sup>13</sup> Eastern Hydro's response to the 2007 Compliance Order did not demonstrate that it had begun construction of the fish lift, and failed to provide a schedule for filing plans and specifications with the Commission's Atlanta Regional Office as required by the 2006 Order. On February 8, 2011, Commission staff issued an order directing Eastern Hydro to show cause why the Commission should not require Eastern Hydro to cease generation at the project. Commission staff warned Eastern Hydro that failure to comply with the requirements of the order could result in the imposition of civil penalties or revocation of the license pursuant to section 31 of the FPA.

8. Eastern Hydro responded on March 9, 2011, and expressed interest in constructing a fish ladder in lieu of the fish lift.<sup>14</sup> On June 20, 2012, Eastern Hydro filed plans for the construction of a fish ladder.

9. In December 2012, Commission staff issued an order modifying and approving Eastern Hydro's new drawings for a fish ladder (2012 Order).<sup>15</sup> The 2012 Order required Eastern Hydro to modify its fish passage designs and file revised plans and specifications with the Commission's Atlanta Regional Office at least 60 days before beginning construction. In addition, the order required Eastern Hydro to file, for Commission approval: (1) a construction schedule that guaranteed fish ladder operation beginning in 2014; and (2) a fish ladder operation plan developed in consultation with Georgia DNR, NMFS, and FWS that describes the target species for fish passage, operation schedules, and a method for determining the effectiveness of the fish ladder following its

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<sup>12</sup> *Eastern Hydroelectric Corporation*, 116 FERC ¶ 62,132 (2006).

<sup>13</sup> *Eastern Hydroelectric Corporation*, 119 FERC ¶ 62,075 (2007).

<sup>14</sup> A fish ladder is different from a fish lift. A fish ladder allows fish to swim upstream through a series of steps or baffles, whereas the fish lift transports fish via a hopper and elevator system from the toe of the dam to the top of the dam.

<sup>15</sup> *Eastern Hydroelectric Corporation*, 141 FERC ¶ 62,176 (2012). Eastern Hydro filed a late request for rehearing of the order, which the Commission's Secretary rejected as untimely. *Eastern Hydroelectric Corporation*, 142 FERC ¶ 61,055 (2013).

first year of operation. The order required Eastern Hydro to file the construction schedule and operation plan within 120 days (i.e., by April 6, 2013). Eastern Hydro could not begin construction of the fish ladder until authorized by the Commission's Atlanta Regional Office.

10. Eastern Hydro did not file the construction schedule or fish ladder operation plan by the April 6, 2013 deadline.

11. On April 17, 2013, Commission staff issued a letter directing Eastern Hydro to file, by May 2, 2013, the overdue construction schedule, fish ladder operation plan, and documentation of consultation with Georgia DNR, NMFS, and FWS.

12. On May 2, 2013, Eastern Hydro filed the construction schedule and operation plan and stated that it would begin fish ladder operation by March 15, 2014.

13. On May 9, 2013, Commission staff responded. Commission staff concluded that Eastern Hydro's construction schedule was unrealistic. According to the schedule, Eastern Hydro planned to start construction by July 1, 2013, exactly 60 days from the date of its May 2, 2013 filing. At the time, Eastern Hydro had not yet provided its revised plans and specifications to the Atlanta Regional Office, although the 2012 Order required Eastern Hydro to submit them for review and comment, along with other preconstruction plans and specifications, at least 60 days prior to the start of construction. In addition, Commission staff stated that the fish ladder operation plan failed to provide protocols for monitoring the effectiveness of the fish ladder as required by the 2012 Order. To ensure that construction of the fish ladder could begin as soon as possible, the May 9 letter required Eastern Hydro to provide, within 15 days from the date of the letter (i.e., by May 24, 2013): (1) documentation of consultation with the agencies, (2) effectiveness protocols for its operation plan; and (3) revised plans and specifications to the Atlanta Regional Office for review.

14. On May 24, 2013, Eastern Hydro abandoned the schedule it had filed three weeks earlier and asked for more time to consult with the agencies concerning the effectiveness protocols. On May 30 and 31, 2013, FWS, Georgia DNR, and NMFS filed comments on the construction schedule and operation plan. The agencies explained that, in order to expedite the process, they had prepared a draft operation plan and given it directly to Eastern Hydro on March 28, 2013.<sup>16</sup> The agencies explained that Eastern Hydro had included the plan in its May 2, 2013 filing, except for the section of the plan that

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<sup>16</sup> See FWS May 30, 2013 filing at 1. FWS' filing included the draft operation plan.

contained the effectiveness protocols. The agencies also stated that Eastern Hydro had not contacted them to discuss or modify the protocols.

15. On June 20, 2013, Commission staff issued a letter granting Eastern Hydro's request for more time to consult with the agencies to develop the effectiveness protocols. Commission staff directed Eastern Hydro to file its protocols by August 19, 2013, and warned it that failure to provide the protocols could result in the imposition of civil penalties or revocation of the license pursuant to section 31 of the FPA.

16. Eastern Hydro did not file the fish ladder effectiveness protocols or the revised plans and specifications.

17. On September 5, 2013, Commission staff issued a Compliance Order (2013 Compliance Order), finding that Eastern Hydro was in violation of Article 401 of its license, Condition 4 of its water quality certification, and the 2012 Order modifying and approving Eastern Hydro's proposed fish ladder.<sup>17</sup> The 2013 Compliance Order required Eastern Hydro to file a plan and schedule for complying with the 2012 Order that would enable fish ladder operation by 2014, including: (1) a detailed construction schedule, including revised plans and specifications for review by the Commission's Atlanta Regional Office; (2) specific fish ladder effectiveness protocols; and (3) actions taken by Eastern Hydro to obtain a water withdrawal permit from Georgia DNR. The Compliance Order stated that Eastern Hydro's plan and schedule must include copies of correspondence between Eastern Hydro and Georgia DNR, NMFS, and FWS. The 2013 Compliance Order directed Eastern Hydro to file the outstanding items within 15 days (i.e., by September 20, 2013). Finally, the 2013 Compliance Order warned Eastern Hydro that failure to comply could result in civil penalties, an order to cease operation of the project, or revocation of the license pursuant to section 31 of the FPA.

18. On September 17, 2013, Eastern Hydro provided: (1) a revised construction schedule that pushed construction back another year (with construction beginning July 1, 2014, and ending December 31, 2014); (2) a proposal to discuss the effectiveness protocols with the agencies; and (3) a copy of the draft water withdrawal permit from Georgia DNR. Eastern Hydro did not include any documentation of consultation with the agencies and did not provide a schedule for submitting its revised plans and specifications to the Atlanta Regional Office for review.

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<sup>17</sup> *Eastern Hydroelectric Corporation*, 144 FERC ¶ 62,211 (2013).

19. On October 1, 2013, Commission staff issued an order directing Eastern Hydro to show cause why the Commission should not require Eastern Hydro to cease generation at the project.<sup>18</sup> The order gave Eastern Hydro 30 days to respond.

20. On October 30, 2013, Eastern Hydro responded, stating that ceasing generation would cause Eastern Hydro and its employees economic harm and would eliminate the benefits of hydropower at the site. However, Eastern Hydro did not provide any proof of consultation with the agencies and again asked for additional time to continue discussions with the agencies regarding the fish ladder effectiveness protocols.

21. Eastern Hydro did not make any other filings to satisfy the 2013 Compliance Order's requirements.

22. On April 17, 2014, Commission staff issued an order requiring Eastern Hydro to cease generation within five days from the date of the order.<sup>19</sup> On April 28, 2014, and May 28, 2014, Commission staff sent Eastern Hydro letters stating that staff was eager to resolve the matter and available anytime to discuss the actions needed to bring the project back into compliance with the license.<sup>20</sup> Staff asked Eastern Hydro for a date and time to discuss the situation. Eastern Hydro did not seek rehearing of the staff order and did not respond to staff's letters.

23. On July 17, 2014, we issued an order proposing revocation of the license (Order Proposing Revocation).<sup>21</sup> The order provided notice of the proposed revocation under section 31 of the FPA and gave Eastern Hydro 30 days (i.e., by August 18, 2014) to request an evidentiary hearing before an Administrative Law Judge. Eastern Hydro did not respond by the deadline.

24. On August 25, 2014, Eastern Hydro filed an untimely response to the Order Proposing Revocation. Eastern Hydro asked for an additional 20 days to work with Commission staff to resolve its noncompliance with the fishway requirements. Eastern Hydro acknowledged that it did "not [contest] the history of the project," but explained that it was not informed of the revocation proceeding until August 19, 2014, because its

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<sup>18</sup> *Eastern Hydroelectric Corporation*, 145 FERC ¶ 62,003 (2013).

<sup>19</sup> *Eastern Hydroelectric Corporation*, 147 FERC ¶ 62,045 (2014).

<sup>20</sup> Both letters were sent by certified mail and were received by Eastern Hydro.

<sup>21</sup> *Eastern Hydroelectric Corporation*, 148 FERC ¶ 61,028 (2014).

representative had been out of the country.<sup>22</sup> Eastern Hydro did not request an evidentiary hearing before an Administrative Law Judge.

25. On October 16, 2014, we issued the Order Revoking License for the East Juliette Project No. 7019 under section 31 of the FPA.<sup>23</sup> The order found that Eastern Hydro knowingly violated the 2013 Compliance Order after having been given a reasonable time to comply with the order.<sup>24</sup> An inspection of the project on August 22, 2013, by the Commission's Atlanta Regional Office, found no adverse conditions that might immediately affect project safety. Upon the revocation of the license, authority over the site passed to the State of Georgia's dam regulatory authorities.

26. On November 14, 2014, Eastern Hydro filed what purported to be a notice of withdrawal of its 2000 Amendment Application, claiming that there was good cause to accept withdrawal of the 2000 Amendment Application and to vacate the 2002 Amendment Order. Thereafter, on December 11, 2014, Eastern Hydro filed a request for judicial notice of the withdrawal of its 2000 Amendment Application, stating that its November 14 filing became effective 15 days after it was filed.

27. On November 17, 2014, Eastern Hydro filed a request for rehearing and motion for stay of the Order Revoking License. On rehearing, Eastern Hydro asserts that: (1) the Commission lacks jurisdiction over the East Juliette Project; (2) the Commission cannot alter its license absent Eastern Hydro's mutual agreement; (3) the Commission cannot revoke the entirety of Eastern Hydro's license where Eastern Hydro did not violate the terms of its original 643-kW license; (4) the 2002 Amendment Order is void as a matter of law because it failed to establish specific fishway prescriptions at the project; (5) Eastern Hydro was denied due process because it could not propose alternative fishway prescriptions or seek an agency trial-type hearing during the fishway consultation process; and (6) the Commission should stay its Order Revoking License pending review of Eastern Hydro's rehearing request.

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<sup>22</sup> Eastern Hydro stated that its president, Mr. Robert Rose, had been in South America working on another project that "is far larger than the Juliette fish ladder and demonstrates that we have the expertise and financial capacity to complete projects."

<sup>23</sup> *Eastern Hydroelectric Corporation*, 149 FERC ¶ 61,036 (2014).

<sup>24</sup> 16 U.S.C. § 823b(b) (2012) (after notice and an opportunity for an evidentiary hearing, the Commission may issue an order revoking a license, where the licensee is found by the commission to have knowingly violated a final order after having been given reasonable time to comply fully with that order).

28. On November 17, 2014, Friends of Juliette Dam, Inc., filed a motion to intervene. On December 19, 2014, NMFS filed an answer to Eastern Hydro's request for rehearing.<sup>25</sup> On January 15, 2015, Friends of Juliette Dam filed comments in support of Eastern Hydro's request for rehearing. On January 20, 2015, American Rivers and Altamaha Riverkeeper (conservation groups) jointly filed an answer to Eastern Hydro's request for rehearing. On January 20, 2015, Eastern Hydro filed a motion to strike NMFS' December 19 answer. On January 28, 2015, NMFS filed an answer to Eastern Hydro's motion to strike. On February 4, 2015, Eastern Hydro filed a motion to strike the conservation groups' January 20 answer.

## **II. Procedural Matters**

### **A. Friends of Juliette Dam, Inc.'s Motion to Intervene**

29. No purpose would be served by granting Friends of Juliette Dam's motion to intervene because the substantive effect of intervening in a Commission proceeding is obtaining party status, which entitles the intervenor to request rehearing of an order issued in the proceeding and to seek judicial review of such an order.<sup>26</sup> Here, Friends of Juliette Dam did not file a request for rehearing of the Order Revoking License, or suggest that it wished to do so if its motion to intervene were granted. Thus, granting it intervenor status at this point would give it no rights.<sup>27</sup> We therefore deny its motion to intervene.

### **B. Answers and Motions to Strike**

30. Commission regulations provide that an answer may not be made to a request for rehearing, unless the decisional authority orders otherwise.<sup>28</sup> We see no reason to allow

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<sup>25</sup> NMFS' filing also stated its objections to the Friends of Juliette Dam's motion to intervene and Eastern Hydro's notice of withdrawal of the 2000 Amendment Application.

<sup>26</sup> See *City of Orrville v. FERC*, 147 F.3d 979, 984 n.3 (D.C. Cir. 1998).

<sup>27</sup> The requirement that a party seek rehearing within 30 days of the issuance of a Commission order is a statutory obligation that the Commission cannot waive. See 16 U.S.C. § 825l(a) (2012). See, e.g., *City of Tacoma, Washington*, 105 FERC ¶ 61,333, at P 17 (2003). Therefore, even if Friends of Juliette Dam's motion to intervene were granted, the Commission could not accept any request for rehearing it were to file thereafter.

<sup>28</sup> 18 C.F.R. §§ 385.213(a)(2), 385.713(d) (2014).

answers to Eastern Hydro's request for rehearing. Consequently, we reject NMFS' December 19, 2014 filing, Friends of Juliette Dam's January 15, 2015 filing, and the conservation groups' January 20, 2015 filing as answers to Eastern Hydro's request for rehearing. As a result, Eastern Hydro's January 20 and February 4, 2015 motions to strike, and NMFS' January 28, 2015 answer to the January 20, 2015 motion to strike are dismissed as moot.

**C. Eastern Hydro's Notice of Withdrawal**

31. On November 14, 2014, Eastern Hydro filed a purported notice of withdrawal of its 2000 Amendment Application, and on December 11, 2014, it asked the Commission to take notice that the withdrawal became effective at the end of 15 days after it was filed. Eastern Hydro argues that, with the withdrawal of its amendment application, the 2002 Amendment Order must be revoked or otherwise invalidated.

32. Eastern Hydro's attempt to withdraw its 2000 Amendment Application comes some 13 years too late. While Rule 216 of the Commission's Rules of Practice and Procedure, which Eastern Hydro cites, permits any party to a proceeding to seek withdrawal of a pleading by filing a notice of withdrawal,<sup>29</sup> that rule applies to proceedings that are pending before the Commission. A proceeding ends when the Commission (or its delegate) issues an order and that order becomes final. After that point, a party can no longer withdraw a pleading made in a completed proceeding in an effort to change the result of a final order.

33. The 2002 Amendment Order approved with modifications Eastern Hydro's 2000 Amendment Application. If Eastern Hydro objected to the fish passage requirements of the 2002 Amendment Order, it should have sought rehearing of the order. It did not, and the order became final 30 days later. It cannot now unilaterally alter its license by purporting to withdraw its 2000 Amendment Application (which it argues results in the vacation of the 2002 Amendment Order). To do so is contrary to section 6 of the FPA, which provides that licenses "may be altered or surrendered only upon mutual agreement between the licensee and the Commission ...."<sup>30</sup> Moreover, allowing such an action would destroy the administrative certainty of Commission

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<sup>29</sup> *Id.* § 385.216 (2014). The Commission may disallow the withdrawal, in all or in part, for good cause. If no motion in opposition to a notice of withdrawal is filed, and the Commission does not issue an order disallowing the withdrawal, withdrawal is effective at the end of 15 days from the date filing of the notice. *Id.* § 385.216(b).

<sup>30</sup> 16 U.S.C. § 799 (2012).

proceedings since no party could be sure that a proceeding was truly over and the results final.<sup>31</sup>

34. For the above reasons, we reject Eastern Hydro's notice of withdrawal as untimely.<sup>32</sup>

### **III. Discussion**

#### **A. Commission's Jurisdiction Over the East Juliette Project**

35. On rehearing, Eastern Hydro claims, without elaboration, that the Commission lacks jurisdiction over the Eastern Juliette Dam because the dam is located on a non-navigable portion of the Ocmulgee River.

36. Eastern Hydro is mistaken. Location on a navigable river is only one of the possible bases for Commission jurisdiction over a hydropower project. As pertinent here, under FPA section 23(b)(1),<sup>33</sup> a license is required for a non-federal hydroelectric project if it: (1) is located on a non-navigable stream over which Congress has Commerce Clause jurisdiction (Commerce Clause waterway); (2) affects the interests of interstate or foreign commerce; and (3) is constructed or enlarged after August 26, 1935.<sup>34</sup>

37. The East Juliette Project is located on a Commerce Clause waterway because it is located on the Ocmulgee River, a tributary to the Altamaha River,<sup>35</sup> which is a navigable water of the United States.<sup>36</sup> Because the project involved post-1935 construction,<sup>37</sup> is

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<sup>31</sup> The appropriate course for Eastern Hydro to seek to alter the results of the 2002 Amendment Order after it became final would have been to file a further amendment application, which would have been subject to public notice and hearing.

<sup>32</sup> Because Eastern Hydro cannot withdraw a pleading after a Commission decision becomes final, withdrawal of the 2000 Amendment Application was not effective at the end of 15 days from the date of filing of the notice of withdrawal (i.e., on December 1, 2014). *See* 18 C.F.R. § 385.216(b). With our rejection of Eastern Hydro's notice of withdrawal, its December 11, 2014 request for judicial notice of the withdrawal is dismissed as moot.

<sup>33</sup> 16 U.S.C. § 817(1) (2012).

<sup>34</sup> *See Farmington River Power Co. v. FPC*, 455 F.2d 86 (2nd Cir. 1972).

<sup>35</sup> *Georgia Power Company*, 39 FPC 15, 16 (1968).

<sup>36</sup> *Georgia Power Company*, 4 FPC 33, 38 (1944).

located on a Commerce Clause waterway, and affects interstate commerce by selling its power through an interstate grid, the project was required to be licensed pursuant to FPA section 23(b)(1).<sup>38</sup>

**B. Commission's Authority to Revoke Eastern Hydro's License**

38. Eastern Hydro argues that the Commission's authority to revoke its license is limited to the subject matter of the 2002 Amendment Order.<sup>39</sup> Specifically, Eastern Hydro claims that the Commission only provided notice of noncompliance, pursuant to FPA section 31(b),<sup>40</sup> concerning license Article 401 and Condition 4 of the water quality certification, both of which were incorporated into Eastern Hydro's license by the 2002 Amendment Order. As a consequence, Eastern Hydro contends that it never received "notice" of any noncompliance related to the terms of its original license and, therefore, the Commission has no authority to revoke Eastern Hydro's license in its entirety.

39. Eastern Hydro misunderstands the terms of its license, the effect of the 2002 Amendment Order, and the provisions of section 31(b) of the FPA. The 2002 Amendment Order considered Eastern Hydro's amendment proposal and accepted it with modifications that were necessary to ensure that the amended license would meet the comprehensive development/public interest standard of section 10(a)(1) of the FPA. When Eastern Hydro did not seek rehearing of the 2002 Amendment Order, it became subject to all of the terms of the amended license.<sup>41</sup> The license for the East Juliette Project, as amended from time to time, exists as a whole. It is not severable or subject to parsing to fit the desires of the licensee, and the argument that, under section 31(b) of the

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<sup>37</sup> The 1986 license authorized the licensee to rebuild the project's generating units. *City of Forsyth, Georgia*, 34 FERC ¶ 62,438 (1986).

<sup>38</sup> *Id.* at 63,554 (finding that the project "would affect the interests of interstate or foreign commerce"). See 16 U.S.C. § 817(1) (2012).

<sup>39</sup> The 2002 Amendment Order, *inter alia*, authorized construction of a new 1,200-kW powerhouse, required fish passage facilities to be built at the dam, changed the license from a minor license to a major license, and added four conditions contained in a water quality certification issued by Georgia DNR.

<sup>40</sup> *Id.* § 823b(a) (2012).

<sup>41</sup> See section 6 of the FPA, 16 U.S.C. § 799 (2012) (licenses may be altered only upon mutual agreement of the licensee and the Commission).

FPA, the Commission can revoke only those requirements with which a licensee refuses to comply is unconvincing. Eastern Hydro's reliance on the language of section 31(b) to support its argument is misplaced. That section provides, in pertinent part:

(b) Revocation Orders. After notice and opportunity for an evidentiary hearing, the Commission may also issue an order revoking any license issued under this part ... where any licensee ... is found by the Commission: (1) to have knowingly violated a final [compliance] order ...; and (2) to have been given reasonable time to comply fully with such order prior to commencing any revocation proceeding.<sup>42</sup>

Nothing in section 31 suggests that the Commission's authority to revoke a license of a non-compliant licensee is under any circumstances limited to a portion of the project at issue.<sup>43</sup>

### **C. 2002 Amendment Order is Not Void**

40. Eastern Hydro claims that its consultations with the Georgia DNR, NMFS, and FWS, as required by license Article 401 and Condition 4 of the water quality certification, failed because the resource agencies continually demanded increasingly costly and burdensome fish passage facilities at the project. Eastern Hydro asserts that the 2002 Amendment Order is void as a matter of law because the Commission could not

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<sup>42</sup> 16 U.S.C. § 823b(b) (2012).

<sup>43</sup> Accepting Eastern Hydro's theory could lead to unworkable results. For example, if a license was amended to allow the licensee to rebuild a dam, and it thereafter failed to comply with conditions in the amendment order, under Eastern Hydro's logic, the Commission could only revoke the license as to the dam, thereby leaving the licensee still authorized to operate the powerhouse, penstocks, and other project works.

In addition, Eastern Hydro's assertion that FPA section 31 is somehow limited by FPA section 26, 16 U.S.C. § 820 (2012), is mistaken. FPA section 26 pre-dates section 31 and authorizes the Commission to ask the U.S. Attorney General to institute a proceeding in a United States district court to revoke a license or remedy violations of a license. Section 31 was added to the FPA in 1986 so that the Commission could act under its own authority to, *inter alia*, revoke a license or prevent license violations.

have anticipated or considered the ever-escalating costs of the fish ladder imposed by the resource agencies.<sup>44</sup>

41. Eastern Hydro is mistaken. As explained above, the 2002 Amendment Order became final when Eastern Hydro did not seek rehearing of the order. Arguing now that the order contained illegal or overly-burdensome requirements is nothing more than an impermissible collateral attack on the order some 13 years after it was issued and final.<sup>45</sup> A final order does not become invalid even if its terms prove to be unworkable or more burdensome than originally anticipated. In such a case, a licensee may seek to amend its license; it cannot assume away the order.

42. In any event, Eastern Hydro's claim that it was unfairly prejudiced throughout consultation with Georgia DNR, FWS, and NMFS is unfounded. While Eastern Hydro is entitled to disagree with the measures recommended by the agencies, including, for example, video monitoring, fish tagging, and installation of a public viewing area, Eastern Hydro cannot refuse to consult with the agencies as required by its license. As explained in the Order Revoking License, Eastern Hydro repeatedly failed to submit documentation of consultation with the agencies, and completely failed to consult with the agencies as required by the 2012 Order approving fish ladder design.<sup>46</sup> Consequently,

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<sup>44</sup> Eastern Hydro also claims that, with its withdrawal of its 2000 Amendment Application, it has withdrawn its agreement to the 2002 Amendment Order. Eastern Hydro asserts that the Order Revoking License is void under FPA section 6, because the Commission cannot revoke Eastern Hydro's license based on license amendments that lack Eastern Hydro's agreement. As explained above, we have rejected Eastern Hydro's attempt to withdraw its 2000 Amendment Application, so this argument is moot. Moreover, by declining to seek rehearing of the amendment order, Eastern Hydro accepted it.

<sup>45</sup> In addition, Eastern Hydro asserts that the water quality certification is flawed because Georgia DNR lacked authority to include in the certification a requirement for fish passage facilities. However, this issue also is many years too late and moreover is not within the Commission's purview. Rather, consideration of such arguments would have been through appeal of the certification at the state level.

<sup>46</sup> Eastern Hydro's May 2, 2013 construction schedule and fishway operation plan incorporated the fishway operation plan prepared by Georgia DNR, FWS, and NMFS and mailed to Eastern Hydro on March 28, 2013, but Eastern Hydro removed the fishway effectiveness protocols included in the agencies' plan. On May 30 and 31, 2013, the agencies filed comments on Eastern Hydro's construction schedule and fishway operation plan, and stated that Eastern Hydro never consulted with them to discuss or modify the protocols.

Eastern Hydro never developed fish ladder effectiveness protocols and never submitted a revised fish ladder design as required by the 2012 Order and September 2013 Compliance Order. The Commission, therefore, never had an opportunity to consider the merits of the measures recommended by the agencies. In sum, Eastern Hydro is the only one to blame for its own failure to comply with the requirements of its license.

**D. Applicability of Revised FPA Section 18 and Section 33**

43. Section 18 of the FPA<sup>47</sup> provides that the Commission shall require the construction, maintenance, and operation by a licensee of such fishways as may be prescribed by the Secretary of the Interior or the Secretary of Commerce, as appropriate. In 2005, FPA section 18 was amended and a new section 33 was added to the FPA.<sup>48</sup> As amended, section 18 provides an opportunity for an agency trial-type hearing “on any disputed issues of material fact” regarding fishways prescribed under section 18, and section 33 allows license applicants to propose alternatives to section 18 fishway prescriptions.

44. Eastern Hydro claims that our Order Revoking License violates its due process rights because it was never granted the opportunity to propose alternative fishway prescriptions or to seek an agency trial-type hearing and determination on the record concerning disputed fishway terms, pursuant to FPA sections 18 and 33.

45. Eastern Hydro is mistaken. The requirement that Eastern Hydro install fish passage at the project dam was not a mandatory fishway prescription under section 18 of the FPA. The requirement was included in the license by Commission staff pursuant to section 10(a)(1) of the FPA and as a requirement of the Georgia state water quality certification, not as the result of a prescription by NMFS or FWS.<sup>49</sup> Thus, FPA sections 18 and 33 are not applicable to this license. In any event, even if the fish passage requirement had resulted from a section 18 prescription, the revised procedures

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<sup>47</sup> 16 U.S.C. § 811 (2012).

<sup>48</sup> Energy Policy Act of 2005, Pub. L. No. 109-58, § 241(b), 119 Stat. 594, 674-75 (2005).

<sup>49</sup> *Eastern Hydroelectric Corporation*, 99 FERC ¶ 62,207, at 64,490 (2002).

of sections 18 and 33 would not have applied inasmuch as these procedures did not become provisions of the FPA until three years after the 2002 Amendment Order was issued and final.<sup>50</sup>

**E. Request for Stay**

46. Lastly, Eastern Hydro requests a stay of our Order Revoking License, pending Commission action on rehearing. With the issuance of this order denying Eastern Hydro's request for rehearing, its motion for stay is now moot and is dismissed.

The Commission orders:

(A) Eastern Hydroelectric Corporation's November 14, 2014 notice of withdrawal of application to amend license, filed in Project No. 7019-070, is rejected.

(B) Eastern Hydroelectric Corporation's December 11, 2014 request for judicial notice of withdrawal of application to amend license is dismissed as moot.

(C) Eastern Hydroelectric Corporation's November 17, 2014 request for rehearing of the October 16, 2014 order revoking license, filed in Project No. 7019-069, is denied.

(D) Eastern Hydroelectric Corporation's November 17, 2014 motion for stay of the October 16, 2014 order revoking license is dismissed as moot.

(E) Friends of East Juliette Dam, Inc.'s November 17, 2014 motion to intervene is denied.

(F) The answers to Eastern Hydroelectric Corporation's request for rehearing filed by National Marine Fisheries Service on December 19, 2014, by Friends of Juliette Dam, Inc. on January 15, 2015, and by American Rivers and Altamaha Riverkeeper jointly on January 20, 2015 are rejected.

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<sup>50</sup> Additionally, FWS and NMFS regulations provide that the revised procedure of FPA sections 18 and 33 only "applies to any hydropower license proceeding for which the license has not been issued as of November 17, 2005 and for which one or more ... prescriptions have been or are filed with FERC." 50 C.F.R. § 221.1(d)(1) (2014); 43 C.F.R. § 45.1(d)(1) (2014).

(G) Eastern Hydroelectric Corporation's January 20 and February 4, 2015 motions to strike, respectively, the National Marine Fisheries Service's December 19, 2014 filing and the joint American Rivers's and Altamaha Riverkeeper's January 20, 2015 filing are dismissed as moot.

(H) The National Marine Fisheries Service's January 28, 2015 answer to Eastern Hydroelectric Corporation's January 20, 2015 motion to strike is dismissed as moot.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.